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No.

In the Supreme Court of the United States

October Term, 1983

ALCAN ALUMINIUM LIMITED,
Petitioner,

vs.

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Operating Through Its New York Office; FRANK GOODMAN, Individually, and As District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, Individually, and As Supervisor-Audit Group, New York Office of the Franchise Tax Board of the State of California,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Second Circuit

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QUESTION PRESENTED

1. Did the Second Circuit err in finding, as a matter of law, that the Respondents' unitary tax on domestic subsidiary-foreign parent combinations does not constitute a tax burden upon Petitioner's foreign activities in violation of the Foreign Commerce and Due Process Clauses of the United States Constitution and that therefore Petitioner lacks standing to bring this action?

RULE 28.1 STATEMENT

Petitioner is a Canadian corporation and has no United States subsidiaries or related companies that are not wholly owned. Petitioner has no parent corporation.

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No.

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THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Operating Through Its New York Office; FRANK GOODMAN, Individually, and As District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, Individually, and As Supervisor-Audit Group, New York Office of the Franchise Tax Board of the State of California,
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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Second Circuit

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit adopting the opinion of the United States District Court for the Southern District of New York is unreported

and is set forth in Appendix I. The decision of the District Court dismissing this case is reported at 558 F. Supp. 624 (S.D.N.Y. 1983) and is set forth in Appendix II. The first opinion of the District Court, which stayed this case, is reported at 539 F. Supp. 512 (S.D.N.Y. 1982) and is set forth in Appendix III.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 17, 1983. On September 7, 1983, Justice Marshall extended the time for filing this Petition for Certiorari to and including October 14, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional challenge in this case is under the Foreign Commerce and Due Process Clauses of the United States Constitution: "The Congress shall have the power to regulate commerce with foreign Nations and among the several states and with the Indian tribes." Article I §8, cl. 3; "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." 14th Amendment. Involved also is 28 U.S.C. §1341 (Tax Injunction Act) which states: "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

STATEMENT OF THE CASE

Petitioner Alcan Aluminium Limited (hereinafter "Petitioner") is a corporation organized and existing under the laws of Canada; its headquarters and principal place of business are in Montreal, Quebec. Petitioner and various of its subsidiaries are engaged in all phases of the aluminum business on an international scale. Petitioner and nearly one hundred of its subsidiaries operate in several different countries—all wholly outside the United States. Neither Petitioner nor any of its non-United States subsidiaries ("foreign subsidiaries") does business in the United States.

Petitioner indirectly owns all of the issued stock of Alcan Aluminum Corporation (hereinafter "Alcancorp"). Alcancorp is a corporation organized and existing under the laws of the State of New York; its principal place of business is at Cleveland, Ohio. Alcancorp and its subsidiaries are engaged in the business of fabricating and selling various aluminum products in the United States. Certain of the activities of Alcancorp are conducted in the State of California.

The Respondents in this case are the Franchise Tax Board of the State of California, Frank Goodman, District Manager of the New York Office of the Tax Board, and Joseph E. Geoghegan, Supervisor-Audit Group of the New York Office of the Tax Board.

Respondents assess franchise taxes on companies doing business in the State of California on what is known as a "unitary" basis.[1] Under this method of taxation, the income of a company "attributable" to California is calculated by a formula which multiplies the total net income of the company, its parent, the subsidiaries of the parent

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1. *See* Cal. Rev. & Tax Code §§25120-25140 (West 1979).

and its own subsidiaries by the relative percentage of that combined "unitary" group's property, payroll and sales in California.

In computing the franchise taxes due California, Respondents have ignored the corporate distinctions between Petitioner, its foreign subsidiaries and Alcancorp. They have computed the tax due using the income of Petitioner and of its foreign subsidiaries as well as Alcancorp's income, notwithstanding the fact that Petitioner and its foreign subsidiaries conduct no business in the United States. Respondents' justification for such an assessment is the assertion that the business activities conducted in California spread beyond California and national boundaries.

Petitioner, because it has no remedy in state court, filed this action on June 25, 1981, in Federal District Court to challenge the constitutionality of the inclusion by California of its income and that of its foreign subsidiaries in the California tax base for purposes of combined apportionment. Petitioner sought a declaratory judgment that the unitary method of taxation, when applied to domestic subsidiary-foreign parent combinations, is unconstitutional under the Foreign Commerce Clause and the Due Process Clause. Petitioner also sought an appropriate injunction. The Respondents moved to dismiss this action on various jurisdictional and abstention grounds or, alternatively, to transfer this case to the Eastern District of California. Each of these issues was fully briefed and argued by the parties.

The District Court issued its first opinion on May 20, 1982 (Appendix III). It followed the reasoning of the Ninth Circuit set forth in the case of *Capitol Industries-EMI, Inc. v. Bennett*, 681 F.2d 1107 (9th Cir.), *cert. denied*, 455 U.S. 943, *on remand* 560 F. Supp. 134 (N.D.

Cal. 1982), *cert. denied*, ... U.S. ....., 75 L. Ed. 2d 435, 103 S. Ct. 1189 (1983), and held that 28 U.S.C. §1341, the Tax Injunction Act, is not applicable to bar Petitioner's action. The District Court, however, then ordered a stay, adopting the logic of the Ninth Circuit in the *Capitol Industries-EMI* case that such an order would implement the Congressional intent behind §1341.

Petitioner filed a Motion for Reconsideration on June 15, 1982. While never explicitly granting the Motion, the District Court ordered the parties to submit further briefs with respect to the unitary taxation of a multinational corporation, injunctive relief against state action and interference with state taxing authorities in light of recent decisions of this Court.

After these briefs were filed, the District Court wrote to the parties on October 14, 1982, and asked for the submission of briefs on the issue of standing. Briefs were submitted by the Respondents and Petitioner and on March 7, 1983, the District Court filed an Opinion which ordered the dismissal of Petitioner's complaint. In that Opinion (Appendix II) the District Court held that Petitioner's interest was only that of the shareholder, and therefore it lacks standing. The Court came to that conclusion because it found the unitary tax applied by the Respondents does not result in multiple taxation of Petitioner's foreign income nor result in any burden upon Petitioner's activities in foreign commerce. The District Court relied on *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425 (1980), which it concluded resolved the issue of unitary taxation applied to a unitary business with a foreign parent. The Court also held that the Petitioner's interest is only that of a shareholder. Petitioner appealed, and on June 17, 1983 the Court of Appeals for the Second Circuit sustained the District Court and adopted that Court's opinion as its own.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS THE IMPORTANT INTERNATIONAL QUESTION, REFERRED TO BUT UNDECIDED BY THIS COURT IN THE CONTAINER CASE, OF WHETHER STATE UNITARY TAXATION INVOLVING A FOREIGN PARENT CORPORATION IS AN UNCONSTITUTIONAL TAX IN VIOLATION OF THE FOREIGN COMMERCE CLAUSE.

The basic issue in this lawsuit, whether a state can apply unitary taxation to a domestic subsidiary-foreign parent combination, has been the source of significant international friction between the United States and its trading partners and has escalated to the level of exchanges between heads of state.[2]

This Court has recently rendered a number of decisions in an attempt to clarify the legal status of unitary taxation; however, the one area it explicitly excluded from consideration is the case of a domestic subsidiary-foreign parent combination. *Container Corporation of America v. Franchise Tax Board*, ... U.S. ....., 77 L. Ed. 2d 545, 103 S. Ct. 2933 (1983). This case presents that very situation and affords this Court the opportunity to resolve this important international issue now.

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2. See the letter from the Prime Minister of Canada to the President of the United States attached hereto as Appendix IV.

II. THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO ESTABLISH THAT A FOREIGN PARENT CHALLENGING UNITARY TAXATION IS NOT MERELY A SHAREHOLDER SEEKING REDRESS FOR WRONGS TO ITS CORPORATION.

The lower courts disposed of this case by attempting to analogize between this case and the typical case brought by a sole shareholder to redress harm suffered due to an illegal act directed at its corporation. In such a case there is no question as to the lack of standing of the sole shareholder. This legal doctrine, however, does not apply in this unique case where the injury results from the fact that the usual distinctions between corporation and shareholder have been ignored in the combined apportionment computation of the tax.

In the assessment of a unitary tax, corporate, geographic and national distinctions are ignored in computing the tax base because, according to the Respondents' theory:

> The underlying theory of formula apportionment is that because of the unitary nature of business, a dollar's profit has no readily identifiable source; the profit is derived from the operation of the business as a whole.

Supplemental Brief by Defendants on standing, October 26, 1982, at 3-4.

Moreover, the lower courts' conclusion that the unitary tax is only upon Alcancorp and that Petitioner's interest is only that of a shareholder is contradicted by Respondents' own explanation for the tax which states:

> This so-called "unitary method of taxation" requires the computation of the next [*sic*] business income of all corporations engaged in the single unitary business.

Id. at 3.

While Alcancorp receives the tax bill, Respondents' tax is not simply imposed on Alcancorp's income, but rather it is imposed on a tax base that includes the Petitioner's income. The taxing scheme apportions to California a portion of the unitary business income, which includes the income of Petitioner.

The logic of this Court's holding in *Container* contradicts the lower courts' conclusion that Petitioner is merely a shareholder challenging a local tax on a domestic subsidiary. This Court recognized in *Container* that what occurs in the unitary scheme is the worldwide apportionment of the income of a *single unitary enterprise* and that respect for formal corporate lines, the basis for the lower courts' holding on the shareholder issue, can be, and, in fact, are ignored:

> A final point that needs to be made about the unitary business concept is that it is not, so to speak, unitary. There are variations on the theme, and any number of them are logically consistent with the underlying principles motivating the approach. For example, a state might decide to respect formal corporate lines and treat the ownership of a corporate subsidiary as *per se* a passive investment. In *Mobil Oil Corp.*, however, we said that, as a general matter, such a *per se* rule is not constitutionally required.

77 L. Ed. 2d at 554-55 (citations omitted).

Thus, the lower courts' conclusion that Petitioner's interest is exclusively that of a shareholder demonstrates

a gross misunderstanding of the nature of unitary taxation as articulated by both Respondents and this Court.

The lower courts also improperly concluded that the legal incidence of the tax should be determinative as to standing. They concluded that since Alcancorp was sent the tax bill only Alcancorp should have standing to challenge the tax. However, this Court in *Container* recognized that corporate formalities involved in the legal incidence of the tax may well have less significance when the tax is imposed, as in this case, on a unitary business with a foreign parent:

> We recognize that the fact that the legal incidence of a tax falls on a corporation whose formal corporate domicile is domestic might be less significant in the case of a domestic corporation that was owned by foreign interests. We need not decide here whether such a case would require us to alter our analysis.

77 L. Ed. 2d at 572 n.32.

This case presents the opportunity for the Court to determine the significance of the legal incidence of the tax in the case of a domestic corporation owned by a foreign parent.

Finally, the lower courts ignored the burdens on the Petitioner inherent in an Alcancorp challenge of the unitary scheme. The lower courts gloss over the reality that any serious challenge to the tax depends on the direct involvement of the Petitioner regardless of the technical identity of the plaintiff. It is the details of Petitioner's operations together with its foreign subsidiaries which are the basis for the unitary treatment. Thus, the lower courts' characterization of Petitioner's relationship to this case as merely that of a shareholder ignores

the reality of the financial and administrative burdens that have become the source of international complaints.

Thus, this Court should issue a Writ of Certiorari to establish that a foreign parent is a real party in interest which has standing to challenge the unitary tax scheme, not merely a shareholder seeking redress for wrongs to its corporation.

III. THE DECISIONS OF THE LOWER COURTS WRONGFULLY DISMISSING THIS CASE ON STANDING EFFECTIVELY DECIDE THE CONSTITUTIONAL ISSUES.

A. The Lower Courts Denied Standing to Petitioner Because They Misconstrued This Court's Decision in Mobil Oil.

The lower courts mistakenly concluded that this Court had already decided in the *Mobil Oil* case that unitary taxation, as applied in the context of a foreign parent, is not a violation of the foreign commerce clause and, therefore, could create no burden on foreign commerce which would give rise to standing. The District Court stated:

> Plaintiff seeks to further bolster its argument against formula appointment by emphasizing the foreign source of the income being taxed . . . . The weakness of plaintiff's logic aside, this assertion once again ignores *Mobil Oil* which held that the foreign source of income does not preclude its taxation under the unitary method.

Appendix II, p. A10.

This interpretation is in direct conflict with this Court's decision in *Container*, where it unequivocally stated

that it has not yet addressed the constitutionality of unitary taxation in the context of a foreign parent:

> We have no need to address in this opinion the constitutionality of combined apportionment with respect to state taxation of domestic corporations with foreign parents or foreign corporations with either foreign parents or foreign subsidiaries.

77 L. Ed 2d at 568 n.26. Unlike the lower courts in this case, the *Container* opinion also distinguished *Mobil Oil* as an interstate not a foreign commerce case.

B. The Lower Courts Denied Standing to Petitioner Because They Misconstrued This Court's Decision in Japan Line.

The lower courts concede that if Petitioner had an independent claim, it would have an independent basis for standing:

> Alcan argues that the fact that its subsidiary has a remedy and standing is no reason for this Court to deny standing to itself. This would be true if the plaintiff had a valid independent basis for standing.

Appendix II, p. A8.

Petitioner has asserted a number of reasons proving its independent basis for standing: first, the taxing scheme includes all of its income in the Respondents' tax basis; second, the burdens on foreign commerce which cause the tax to be unconstitutional are burdens borne exclusively by Petitioner, since Alcancorp conducts no business in foreign commerce; third, the taxing scheme results in actual double taxation of income earned in foreign commerce by Petitioner and its foreign subsidiaries.

The lower courts rejected these arguments and held that Petitioner has no standing because they found each of Petitioner's independent bases for standing incorrect as a matter of law. They specifically held that the unitary tax is structured to apportion to California only that portion of Alcancorp's income related to its California business activity:

> In an attempt to assert standing for itself in this action plaintiff claims that the FTB has imposed a tax directly on its income. This is not so. California's unitary tax is specifically structured so as to tax a corporation proportionate to the amount of business it does within the State; the unitary tax is not a tax on non-California businesses or income.

Appendix II, p. A7.

The lower courts' refusal to give credit to Petitioner's claim that it is the object of the tax is explained by their rejection out of hand of any relevance to this case of the principles enunciated by this Court in *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). The District Court stated, "Obviously, *Japan Line* is inapposite to the instant case." Appendix II, p. A12.

In *Japan Line* this Court recognized that the Foreign Commerce Clause was designed to prevent the states from interfering with the ability of the federal government to speak with a single voice in matters of foreign commerce. Of particular concern in the area of taxation is the risk of multiple taxation on income of foreign companies who are also subjected to taxation by the foreign countries of their commercial domicile. As the only part of the "unitary business" that finds its income and that of all of its enterprises taxed by the countries in which they operate,

and then again by California, it is Petitioner alone that feels the direct effect of double taxation; it is Petitioner alone that can demonstrate the existence of double taxation; it is the Petitioner that is the real party in interest.

The lower courts simply ignored the extensive materials attached to various of Petitioner's pleadings which demonstrated the existence of actual double taxation. They decided, in effect, that no such taxation could exist as a matter of law. This logic stands in stark contrast to this Court's recent pronouncements in the *Container* decision where this Court acknowledged that *Japan Line* was the most important case in a Foreign Commerce Clause inquiry and explicitly found that the unitary taxing scheme can result in actual double taxation of foreign entities:

> First the tax imposed here, like the tax imposed in *Japan Line*, has resulted in actual double taxation, in the sense that some of the income taxed without apportionment by foreign nations as attributable to appellant's foreign subsidiaries was also taxed by California as attributable to the state's share of the total income of the unitary business of which those subsidiaries are a part.

77 L. Ed. 2d at 567.

It is clear that the lower courts would have been compelled to grant Petitioner standing if they had recognized that unitary taxation applied to domestic subsidiary-foreign parent combinations could result in double taxation and would have accepted Petitioner's extensive evidence of actual double taxation.

C. By Misinterpreting Mobil Oil and Japan Line, the Lower Courts Have Incorrectly Decided the Constitutional Issues.

The lower courts have seriously misunderstood the relative importance of *Mobil* and *Japan Line* as applied to the domestic subsidiary-foreign parent combination. This misunderstanding has caused the lower courts to hold as a matter of law that Petitioner's interests are not affected by the California tax and thus to dismiss on the procedural issue of standing.

By mischaracterizing this case as involving the procedural issue of standing, the decision of the lower courts dismissing Petitioner's claim effectively decides the constitutional issue of unitary taxation with respect to domestic subsidiary-foreign parent combinations. The important constitutional issues of this case should be confronted directly by the courts, not evaded due to a complete misapplication of the concept of standing. A Writ of Certiorari should be granted.

IV. THIS CASE MAY PRESENT THE ONLY OPPORTUNITY FOR THIS COURT TO RULE ON THE CONSTITUTIONALITY OF APPLYING A UNITARY TAXATION SCHEME TO A DOMESTIC SUBSIDIARY OF A FOREIGN PARENT SINCE THERE IS A SERIOUS QUESTION AS TO WHETHER PETITIONER'S DOMESTIC SUBSIDIARY HAS STANDING TO RAISE A FOREIGN COMMERCE CHALLENGE IN THE STATE COURTS.

The constitutional challenge in this case focuses on improper burdens on activities in foreign commerce created by the unitary taxing scheme. Petitioner's foreign income creates the additional tax liability, and the economic

impact of the tax is exactly the same on the Petitioner as it is on its domestic subsidiary. The difference between Petitioner and its domestic subsidiary is that the domestic subsidiary is the recipient of the tax bill while the Petitioner is the exclusive object of the burden on foreign commerce.

California Code of Civil Procedure §367 provides: "Every action must be prosecuted in the name of the real party in interest . . . ." Petitioner knows of no definitive case law on this issue, but it is likely that Respondents, in the action by the domestic subsidiary in state court, will argue that since any burdens on foreign commerce are exclusively on Petitioner, the domestic subsidiary, which conducts no business in foreign commerce, is not the real party in interest to raise such a challenge.

The potential for success of such an argument by Respondents is illustrated by the fact that any effective constitutional challenge must necessarily involve Petitioner as the most active party. Only Petitioner can provide evidence as to double taxation or clarify its role and that of its foreign subsidiaries in foreign commerce. Thus any constitutional challenge, regardless of in whose name it is raised, must necessarily be managed, directed and financially supported by Petitioner. Thus, it is quite possible that Respondents could persuade the California courts that it is Petitioner rather than its domestic subsidiary that is the real party in interest as to the Foreign Commerce Clause challenge.

The view that the foreign parent is an essential party in any challenge to the unitary taxing scheme is buttressed by both the Ninth Circuit and the District Court who volunteered their view that the pivotal position of the foreign parents in the unitary taxing scheme should

equitably be reflected in an independent cause of action in the state courts:

The Ninth Circuit stated in *Capitol Industries-EMI* that:

> California, however, could eliminate both problems by clearly providing a judicial or administrative remedy in which such non-taxpaying entities, which are interested parties and have stated a claim with respect to an assessment could participate as parties. (*Such a remedy might be particularly appropriate where the state is applying the unitary assessment method to a domestic subsidiary and its foreign parent, and where the state is demanding the business records of the foreign parent.*)

681 F.2d at 1120-21 n.32 (emphasis supplied).

The District Court in the instant case stated in a similar vein:

> Perhaps the best solution to this predicament would be for California to provide a "plain, speedy and efficient" remedy for all injured parties including non-taxpayers . . . . This Court, however, is not in a position to influence the California legislature.

Appendix III, p. A23 n.9.

Another problem that must be noted is that the District Court has concluded that Petitioner's only interest is that of a shareholder, because there is allegedly no impact on foreign commerce created by including Petitioner's income in the unitary tax base.

If the California courts were to accept this reasoning, then there is no issue of foreign commerce to be raised by Petitioner's domestic subsidiary in California even if it

has standing. Thus this standing decision could effectively decide any foreign commerce issue raised by Petitioner's domestic subsidiary.

If Repondents were successful in such a defense to Alcancorp's challenge, and the lower courts' decisions in this case are allowed to stand, a "Catch-22" situation would exist where no party would be capable of making this important foreign commerce challenge. It is thus extremely important for this Court to issue a writ of certiorari and review this entire matter while all procedural options are still available.

V. THIS CASE PRESENTS THE IMPORTANT QUESTION OF WHETHER AN IMPUTED CONGRESSIONAL PURPOSE UNDERLYING THE TAX INJUNCTION ACT, 28 U.S.C. §1341, CAN BE IMPLEMENTED BY VARIOUS PROCEDURAL MECHANISMS AFTER THE STATUTE ITSELF HAS BEEN HELD INAPPLICABLE.

In the various foreign parent challenges to the California scheme of unitary taxation, various courts[3] have attempted to buttress their procedural decision by invoking the policies of the Tax Injunction Act, 28 U.S.C. §1341. The Ninth Circuit in *Capitol Industries-EMI* raised the idea that foreign parents may not have standing, to support its view that circumvention of state remedial procedures should be prevented:

> Allowing a parent corporation to bring an action in federal district court to challenge a state tax assess-

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3. In *Shell Petroleum N.V. v. Graves*, 709 F.2d 593 (1983), cited by the lower courts in this case, the Ninth Circuit invokes the policies of §1341 to support its procedural decision. The *Shell* case plaintiff, which raises issues similar to those of this case, has been granted an extension for filing its petition for a writ of certiorari to and including November 1, 1983.

> ment against its subsidiary corporation could result in the circumvention of state remedial procedures that Sec. 1341 was intended to prevent . . . . In addition, the problem of circumvention of state procedures and of simultaneous litigations can be minimized by the district court in many cases. For example, where appropriate, the district court has authority to stay a federal proceeding brought by an interested non-taxpayer, pending a determination of state administrative and judicial proceedings brought by the taxpayer. The district court also may dispose of actions brought by non-taxpayers, either before or after such a stay, where the *non-taxpayer lacks standing, is not a real-party-in-interest,* or has failed to state a claim upon which relief can be granted.

681 F.2d at 1119-1120 n.32 (emphasis added).

The District Court in this case explicitly adopted the same logic:

> As the Ninth Circuit suggested, to allow a parent corporation to bring an action in federal court to challenge an assessment of a tax on its subsidiary, is to circumvent Congress's basis for enacting the Anti-Injunction statute.

Appendix III, p. A23.

The District Court in this case explicitly followed the suggestions of the Ninth Circuit in attempting to effectuate that "policy" by first granting a stay and finally by dismissing on standing.

In *California v. Grace Brethren Church,* 457 U.S. 393 (1982), this Court made its most recent statement on §1341 and the underlying doctrine of comity. In that case this Court extensively reviewed the history and Congres-

sional policy of §1341. And yet, after doing so, this Court did not conclude that there was a Congressional policy which permitted the ban to federal jurisdiction to be implemented outside the scope of the statute. On the contrary, this Court recognized that the ban did not apply in all cases and that the still vital prerequisite to the Act's application is the availability of a remedy in the state courts. This Court also acknowledged the continuing vitality of *Hillsborough v. Cromwell*, 326 U.S. 620 (1946):

> This Court has not hesitated to declare a state refund provision inadequate to bar federal relief if the taxpayer's opportunity to raise his constitutional claims in the state proceeding is uncertain. In *Hillsborough v. Cromwell*, the taxpayer could not raise his constitutional challege in the administrative proceedings, and appeal to the state courts was discretionary with those courts. Consequently, because there [was] such uncertainty concerning the New Jersey remedy as to make it speculative, the Court held that the taxpayer could seek declaratory relief in federal court.

457 U.S. at 414 (citations omitted).

The comparison with the instant case is obvious. If this Court in *Hillsborough* had acknowledged the existence of a Congressional policy outside the statute it would have stayed the federal case pending a determination as to whether the state courts would exercise jurisdiction. Thus this Court has implicitly rejected the notion that there exists some "congressional policy" inherent in §1341 to be applied even where no state remedy exists.

This Court should issue a writ of certiorari in order to correct the substantial confusion concerning the proper application of any congressional "intent" of the Tax Injunction Act.

CONCLUSION

For the reasons stated above, this petition should be granted and the case set for argument.

Respectfully submitted,

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APPENDIX

APPENDIX I

Opinion and Order of the United States Court of Appeals for the Second Circuit

(Filed June 17, 1983)

83-7236

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals the Second Circuit, held at the United States Courthouse, City of New York, on the 17th day of June One Thousand Nine Hundred and Eighty-three.

PRESENT:

HON. ELLSWORTH A. VAN GRAAFEILAND,
HON. LAWRENCE W. PIERCE
HON. JOHN MINOR WISDOM,*
Circuit Judges

ALCAN ALUMINUM [SIC] LIMITED,
Plaintiff-Appellant.

v.

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, operating through its New York Office;

*Senior Circuit Judge of the Fifth Circuit, sitting by designation.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

FRANK GOODMAN, individually and as District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEORGHEGAN [sic], Individually and as Supervisor - Audit Group, New York Office of the Franchise Tax Board of the State of California,

Defendants-Appellees.

ORDER

Alcan Aluminum [sic] Limited appeals from a judgment of the United States District Court for the Southern District of New York (Goettel, J.) dismissing its complaint against the Franchise Tax Board of the State of California and two of its New York office employees. We find appellant's contentions without merit and affirm substantially for the reasons stated in the opinion of the district court reported at 558 F. Supp. 624.

/s/ E. A. VAN GRAAFEILAND

/s/ L. W. PIERCE

/s/ JOHN MINOR WISDOM

APPENDIX II

Opinion of the United States District Court

(Dated March 4, 1983)

81 Civ. 3911 (GLG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALCAN ALUMINUM [SIC] LIMITED,
Plaintiff,

-against-

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, operating through its New York Office; FRANK GOODMAN, individually and as District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, individually and as Supervisor - Audit Group, New York Office of the Franchise Tax Board of the State of California,
Defendants.

OPINION

APPEARANCES:

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This action concerns a challenge by a foreign corporation against the tax treatment accorded its United States subsidiary by a state taxing authority. The following opinion grows out of an earlier one in which we decided to stay the action and postpone consideration of the substantive issues involved in light of cases then pending before the California courts and the United States Supreme Court. *Alcan Aluminum* [sic] *Limited v. The Franchise Tax Board of the State of California*, 539 F. Supp. 512 (1982). In this opinion, we address the issue of whether plaintiff has standing to bring this action. For the reasons elaborated below, we conclude that it does not.

Plaintiff here is Alcan Aluminum [sic] Limited (Alcan), a Canadian Corporation. The defendants are the Franchise Tax Board of the State of California (FTB) and several of its employees. In this action, plaintiff is challenging the tax treatment that the FTB has accorded its wholly owned American subsidiary, Alcan Aluminum Corporation (Alcancorp).[1] Specifically, Alcan is attacking the

use of California's unitary taxation method to determine its subsidiary's tax liability. Under this scheme, the separate identities of corporate family members are disregarded and all of a corporation's activities in a particular area are consolidated into a single unitary line of business to determine the net income of that business. *Max Factor & Co. v. Franchise Tax Board of California*, 35 Cal. App. 3d 7, 9, 110 Cal. Rptr. 536, 537 (1973). Once this figure is ascertained, the percentages of the business entity's sales, property, and payroll within California are averaged. The previously determined net income is then multiplied by this average percentage to arrive at the corporation's tax liability. *See* Cal. Rev. & Tax Code §§ 25101, 25102, 25128-25136 (West 1979).

Plaintiff has brought this action to challenge the use of its income in determining the net income of its subsidiary. The FTB justifies this inclusion on the ground that Alcancorp and plaintiff's other subsidiaries are engaged in a unitary business, and that unitary taxation is proper "[w]hen the income of the taxpayer . . . is derived from or attributable to sources both within and without the state." Cal. Rev. & Tax Code § 25101 (West 1979). Alcan objects to this global application of unitary taxation on the ground that it is unconstitutional.[2]

The defendants named in this action are the FTB, operating through its New York office, and a number of its representatives, acting as both individuals and as employees of the organization.[3] After this action was brought, defendants subsequently moved to have it dismissed on a number of grounds pursuant to Fed. R. Civ. P. 12(b). Of these various grounds, the only one we consider here is the issue of plaintiff's standing to bring this action. After careful deliberation, we have concluded that plaintiff does not have such standing.

Crucial to an understanding of this action is the federal Anti-Injunction Statute, which provides that "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341 (1976). Defendants argue that this statute bars Alcan's action before this court because Alcan already has a "plain, speedy, and efficient" remedy in the form of its subsidiary's action now pending before the California courts. Defendants argue further that plaintiff is free to bring an action before the California courts itself. Plaintiff responds that its subsidiary has no standing to raise certain constitutional claims which it (Alcan) is raising before this Court.[4] Further, Alcan claims that it has no standing before the California courts because it is not a California taxpayer and California's remedy is available only to taxpayers.

In our earlier opinion in this action, we followed the Ninth Circuit in holding that a non-taxpaying foreign parent corporation is not barred by section 1341 from maintaining an action in federal court merely because a "plain, speedy and efficient" remedy is available to its domestic taxpaying subsidiary. *Alcan Aluminum* [sic], *supra*, 539 F. Supp. at 514-15 (citation omitted).[5] Today, we decide that despite the availability of the Anti-Injunction Statute to this type of plaintiff, Alcan nevertheless lacks standing to sue in this action.

In setting forth certain requirements for standing, the Supreme Court has held that

> No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. See *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The concept of standing is part

> of this limitation. Unlike other associated doctrines, for example, that which restrains federal courts from deciding political questions, standing 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.' *Id.*, at 99. As we reiterated last Term, the standing question in its Art. III aspect 'is whether the plaintiff has "alleged such a personal stake in the controversy" as to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf.' *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) (emphasis in original). In sum, when a plaintiff's standing is brought into issue, the relevant inquiry is whether, assuming justiciability of the claim, the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation."

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 37-38 (1976).[6] Consistently, the courts have required that plaintiffs demonstrate a "distinct and palpable injury" to themselves in order to acquire standing. *Warth v. Seldin, supra*, 422 U.S. at 501.

In an attempt to assert standing for itself in this action, plaintiff claims that the FTB has imposed a tax directly on its income. This is not so. California's unitary tax is specifically structured so as to tax a corporation proportionate to the amount of business it does within the State; the unitary method is not a tax on non-California businesses or income. Because the profits of a unitary business "arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable

'source.'" *Mobil Oil Company v. Commissioner of Taxation*, 445 U.S. 425, 438 (1980). The Supreme Court there recognized such unitary schemes to be a valid method of corporate taxation. *See also ASARCO, Inc. v. Idaho State Tax Commission*, 102 S. Ct. 3103, 3109-10 (1982) and *F.W. Woolworth Co. v. Taxation & Revenue Dept.*, 102 S. Ct. 3128, 3134 (1982). Thus, plaintiff's claim of a direct tax upon itself is invalid and Alcan has no "distinct and palpable injury" on which to base a claim of standing *Warth v. Seldin, supra*, 422 U.S. at 501.

Alcan argues that the fact that its subsidiary has a remedy and standing is no reason for this Court to deny standing to itself. This would be true if plaintiff had a valid independent basis for standing. *See Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896 (5th Cir. 1968). *See also Mullins v. The First National Bank of Virginia*, 275 F. Supp. 712, 721-22 (W.D. Va. 1967). But despite vigorous assertions to the contrary, plaintiff does not have such an independent claim. Once again, Alcan's unsubstantiated allegation of a direct tax upon itself is an insufficient basis for standing. While plaintiff cites a variety of cases giving stockholders a right to sue independently of the corporation when the corporation has been wronged, none of this authority applies to the instant case.[7] In all of these cases, the stockholder was accorded standing on the ground that "the wrong itself amount[ed] to a breach of duty owed to the stockholder personally." *Schaffer, supra*, 397 F.2d at 896. Moreover, it is clear that a mere fluctuation in the value of a corporation's stock or the size of its dividends will not suffice to give a stockholder an independent cause of action.[8] As the *Schaffer* court went on to explain,

> 'And it is universal that where the business or property allegedly interfered with by forbidden practices

> is that being done and carried on by a corporation, it is that corporation alone, and not its stockholders (few or many), officers, directors, creditors or licensors, who has a right of recovery, even though in an economic sense real harm may well be sustained as the impact of such wrongful acts bring about reduced earnings, lower salaries, bonuses, injury to general business reputation, or diminution in the value of ownership.'

Id. at 896, citing *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1956). As plaintiff has failed to show any "independent duty" owed to it by defendant FTB, it has no grounds for standing.[9]

As mentioned above, the Supreme Court has repeatedly recognized the validity of formula apportionment in unitary taxation. Plaintiff seeks to circumvent this recognition by advocating the use of separate accounting. The Supreme Court, however, has already discredited this means of attacking formula apportionment in *Mobil Oil Company v. Commissioner of Taxation*, *supra*, 445 U.S. at 425.[10] In that case, a company sought to avoid taxation under a formula similar to California's by challenging a state's ability to tax income earned outside its borders. The Court replied to this challenge in no uncertain terms:

> The argument that the source of the income precludes its taxability runs contrary to precedent. In the past, apportionability often has been challenged by the contention that income earned in one State may not be taxed in another if the source of the income may be ascertained by separate geographical accounting. The Court has rejected that contention so long as the intrastate and extra-state activities formed part of a single unitary business. See *Butler Bros. v. McColgan*, 315

U.S. 501, 506-508 (1942); *Ford Motor Co. v. Beauchamp*, 308 U.S. 331, 336 (1939); *cf. Moorman Mfg. Co. v. Bair*, 437 U.S., at 272. In these circumstances, the Court has noted that separate accounting, while it purports to isolate portions of income received in various States, may fail to account for contributions to income resulting from functional integration, centralization of management, and economies of scale. *Butler Bros. v. McColgan*, 315 U.S., at 508-509. Because these factors of profitability arise from the operation of the business as a whole, it becomes misleading to characterize the income of the business as having a single identifiable 'source.' Although separate geographical accounting may be useful for internal auditing, for purposes of state taxation it is not constitutionally required. *Id.* at 438.

Plaintiff seeks to further bolster its argument against formula apportionment by emphasizing the foreign source of the income being taxed. In a strained syllogism, plaintiff argues that a) unitary taxation is a tax on foreign commerce, b) Alcancorp engages in no foreign commerce, so c) the tax must be upon Alcan rather than its subsidiary. As previously demonstrated, the unitary tax is imposed *neither* upon foreign commerce *nor* upon Alcan itself. The weakness of plaintiff's logic aside, this assertion once again ignores *Mobil Oil*, which held that the foreign source of income does not preclude its taxation under the unitary method. *Id.* at 438.

In addition to the previously cited authority on unitary taxation, several decisions have recently been handed down in the Ninth Circuit concerning cases with factual situations strikingly similar to the instant one. Plaintiff maintains that these cases do not undermine its position, but it is once again incorrect. *Shell Petroleum N.V. v. Mary*

Ann Graves et al., No. C-81-4302 (N.D. Cal. Aug. 4, 1982), concerned a foreign parent's challenge against the taxation of its domestic subsidiaries under California's method of formula apportionment. In that case, the Court made it clear that the plaintiff, whose position was almost identical to Alcan's here, had no standing. "It does not appear," the court observed, "that the constitutional provisions alleged to have been violated by the imposition of this method of taxation or by the Board's alleged informational demands specifically vest rights in or create any right of action in favor of, the shareholders as shareholders, apart from those of the corporation." *Id.*, slip op. at 9. Plaintiff makes the same claim regarding *EMI Ltd. v. William M. Bennett*, No. C-79-2146 (N.D. Cal. Oct. 8, 1982), another case similar to the instant one in which the court held that the plaintiff had no standing. We agree with the Northern District of California in holding that a plaintiff such as the one before us has no standing.[11] Alcan seeks to distinguish its own position from those of the plaintiffs in *Shell* and *EMI* by alleging that a tax is being assessed directly upon it. In *Shell* and *EMI* by contrast, the plaintiffs made no such claim, instead challenging the tax only insofar as it applied to their subsidiaries. As previously mentioned, plaintiff's claim of a tax imposed directly upon itself is groundless. Once again, the mere assertion of a groundless claim is not sufficient to confer standing upon the claimant.

Finally, plaintiff relies heavily on *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1978) in a further attempt to establish standing. That case concerned a property tax imposed by a local government on shipping containers owned, based, and registered abroad. The Supreme Court specifically limited its holding in *Japan Line* to the narrow issue of "whether instrumentalities of com-

merce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a State." 441 U.S. 444. Obviously, *Japan Line* is inapposite to the instant case. Here, there are no "instrumentalities of commerce" present, and the assessment at issue is an income tax rather than an ad valorem property tax. Thus, *Japan Line* has no bearing on the instant case.

For all of the above reasons, we hold that plaintiff has no standing. It is therefore ordered that the action be dismissed.

SO ORDERED.

Dated: New York, New York
March 4, 1983

/s/ GERARD L. GOETTEL
U.S.D.J.

FOOTNOTES

1. Alcancorp is a New York corporation, qualified to do business in California, with its principal place of business in Ohio.

2. After paying the tax as assessed, Alcancorp proceeded to seek a refund in the California courts. The basic premise of that refund action is that Alcancorp and Alcan's foreign subsidiaries are not involved in a unitary business taxable by California on a worldwide scale. Although some constitutional issues are raised in the California refund action, no injunctive or declaratory relief is sought there. In this action, by contrast, Alcan is seeking primarily declaratory and injunctive relief through constitutional claims.

3. These individuals are Frank Goodman, District Manager of the FTB's New York office, and Joseph E. Geoghegan, Supervisor of the Audit Group in the New York office.

As we noted in our earlier opinion,

> [d]efendants have suggested that the proper responsible parties have not been named as individual defendants in this action. Apparently, the plaintiff has intentionally brought suit against certain local FTB employees, instead of the FTB board members, to establish venue in New York. If the board members were the defendants in this action, venue would not lie in this district because California is where the board members reside and have their official duty stations, and it is the place in which the actions giving rise to these claims occurred. 28 U.S.C. 1391(b) (1976). *Alcan Aluminum* [sic], *supra*, at 514 n. 2.

4. Specifically, plaintiff argues that the state forum is not available to either itself or its subsidiary for claims relating to the foreign commerce clause.

5. At the same time, we expressed serious reservations as to whether the parent's and subsidiary's respective interests were not so similar that the subsidiary's action would determine the claims of both parties. *Alcan Aluminum* [sic], *supra*, at 514.

It should also be noted that in hearing *EMI* on remand, the Northern District of California decided that the plaintiff, who occupied a position very similar to Alcan's in the instant case, had no standing. *EMI Limited v. William M. Bennett et al.*, No. 79-2146 (N.D. Cal. Oct. 8, 1982).

6. In *Eastern Kentucky*, a group of low-income individuals and their representative organizations challenged an IRS decision granting favorable tax treatment to various hospitals. Plaintiffs argued that the hospitals should have been denied this treatment because they did not serve indigent patients to the full extent of their (the hospitals') financial abilities. Ruling that the plaintiffs had not shown sufficient injury to themselves, the Court declined to grant them standing. While the Court specifically denied ever reaching the issue of whether a third party may

ever challenge IRS treatment of another party, *Eastern Kentucky*, *supra*, 425 U.S., at 37, the logical implication was that such a challenge should never be allowed. Indeed, as Justice Stewart noted in his concurring opinion,

> I add only that I cannot now imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else. *Id.* at 46.

7. Alcan acknowledges implicitly that its status as sole shareholder of Alcancorp is insufficient by itself to confer standing to redress a harm done to the corporation. Plaintiff's Memorandum on Standing at 3.

8. Plaintiff alleges that under *American Power & Light Co. v. S.E.C.*, 325 U.S. 385 (1945), "a sole shareholder can have an independent basis for standing, even when its *only injury* is a reduction in its expectation of dividends, if it is clear that the comparative effects of the injury as between the corporation and the shareholder are such that the effect on the corporation is not as adverse as the effect on the shareholder . . ." Plaintiff's Memorandum on Standing at 6-7 (emphasis in original). Plaintiff neglects to point out, however, that this case concerned a statute that specifically granted standing to parties who would not otherwise have had it. 325 U.S. at 389-91. *American Power* has no bearing on the instant case, in which no such statute exists.

9. Alcan might have standing limited to the issue of information demanded from its subsidiary that it must provide, but such standing would be restricted to that specific matter. Even then, such standing might well depend on whether the information was demanded directly of Alcan or indirectly through its subsidiary. This suggestion has already been made by another court in a similar factual situation. *EMI Limited v. William M. Bennett*, 560 F. Supp. 134 (N.D. Cal. 1982).

10. Amazingly, plaintiff does not cite this key case once in its memorandum on standing. This glaring omission, in addition to numerous quotations out of context, does little to support the overall credibility of plaintiff's argument.

11. It should be noted that in both *Shell* and *EMI*, the plaintiffs brought their respective actions in California, the site of the allegedly illegal taxation.

APPENDIX III

Opinion of the United States District Court

(Dated May 20, 1982)

81 Civ. 3911 (GLG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALCAN ALUMINIUM LIMITED,
Plaintiff,

-against-

THE FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, operating through its New York Office; FRANK GOODMAN, individually and as District Manager, New York Office of the Franchise Tax Board of the State of California; and JOSEPH E. GEOGHEGAN, individually and as Supervisor - Audit Group, New York Office of the Franchise Tax Board of the State of California,
Defendants.

OPINION

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GOETTEL, *D. J.*:

This action by Alcan Aluminium, Ltd. (Alcan), a Canadian corporation, challenges the California Franchise Tax Board's (FTB) inclusion of income from non-United States corporations in its calculation of unitary corporate income tax. California's method of unitary taxation does not consider the separate identities of members of a corporate family. *Max Factor & Co. v. Franchise Tax Board of California*, 35 Cal. App. 3d 7, 9, 110 Cal. Rptr. 536, 537 (1973). Rather, it consolidates the companies' activities in a line of business into a single unitary business and calculates the tax payable to California in a two step process. First, the percentages of a single unitary business entity's sales, property, and payroll that are in California are averaged. Second, the average percentage is multiplied by the total income from the single unitary business that the company conducts. *See* Cal. Rev. & Tax Code §§ 25101, 25102, 25128-25136 (West 1979).

The FTB levied the unitary tax on plaintiff's indirectly wholly owned subsidiary Alcan Aluminum Corporation (Alcancorp).[1] In computing Alcancorp's taxable income, the FTB included the payroll, sales, property, and income of Alcan's subsidiaries that are foreign corporations having no business or contacts in the United States. According to the FTB, this computation is proper because Alcancorp and these subsidiaries are engaged in a unitary business, and unitary taxation is appropriate "[w]hen the income of the taxpayer . . . is derived from or attributable to sources both within and without the state." Cal. Rev. & Tax Code § 25101 (West 1979). Alcan insists that a worldwide application of unitary taxation is unconstitutional, especially when the domestic subsidiary deals with the foreign parent corporation and the foreign subsidiaries at arms' length, if at all. Alcan has demonstrated that in years when its United States operations showed a loss and its foreign operations showed profits, it has nevertheless paid California income tax.

Alcancorp has paid the tax as assessed and is seeking a refund in the California courts through procedures available to it as a California taxpayer. The primary theory underlying the refund action is that Alcancorp and Alcan's foreign subsidiaries are not involved in a unitary business taxable by California on a worldwide scale. (Although injunctive and declaratory relief are not sought in the California refund action, some constitutional issues are raised.) In the action before this Court, the foreign parent corporation is raising constitutional claims and primarily seeking declaratory and injunctive relief.

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1. Alcancorp is a New York corporation, qualified to do business in California, with its principal place of business in Ohio.

The defendants named in this action are the FTB, operating through its New York office, Frank Goodman, individually and as District Manager of the New York office, and Joseph E. Geoghegan, individually and as Supervisor of the Audit Group, New York office.[2] They have now moved to dismiss this action pursuant to Fed. R. Civ. P. 12(b) on the grounds that the Court lacks subject matter jurisdiction, that there is an identical action brought by plaintiff's subsidiary pending before the California courts, that venue is improper, and that the complaint fails to state a claim upon which relief can be granted. In the alternative, the defendants ask this Court to abstain from exercising its jurisdiction or to transfer the case,[3] in the interests of justice, to the Eastern District of California, where it could have been brought originally. *See* 28 U.S.C. §§ 1404(a), 1406(a) (1976).[4] These arguments will be considered seriatim.

The defendants' argument concerning subject matter jurisdiction is based on the Anti-Injunction Statute, which provides that "[t]he district courts shall not enjoin, suspend, or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient

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2. Defendants have suggested that the proper responsible parties have not been named as individual defendants in this action. Apparently, the plaintiff has intentionally brought suit against certain local FTB employees, instead of the FTB board members, to establish venue in New York. If the board members were the defendants in this action, venue would not lie in this district because California is where the board members reside and have their official duty stations, and it is the place in which the actions giving rise to these claims occurred. 28 U.S.C. 1391(b) (1976).

3. *See supra* note 2.

4. This alternative, while resisted strenuously by the plaintiff, is not forcefully pressed by the defendants, who apparently prefer the other remedies sought. In any event, the defendants' papers do not contain adequate information to decide that aspect of this motion.

remedy may be had in the courts of such State." 28 U.S.C. § 1341 (1976). The defendants argue that this statute bars a decision on this matter of state taxation because California's "plain, speedy and efficient" remedy is available to plaintiff through its subsidiary's identical action before the California courts. Alcan's response is that not only are the claims in the state and federal actions different, but the state forum is not available to either plaintiff or its subsidiary for constitutional claims relating to the Foreign Commerce Clause. U.S. Const. art. I, § 8. Specifically, it argues that its domestic subsidiary is not engaged in foreign commerce and, therefore, has no standing to raise these constitutional issues of multiple taxation of the instrumentalities of foreign commerce and interference with the exclusive federal jurisdiction over foreign commerce. Further, Alcan argues that it has no standing to raise these issues in the California courts because, although its income and that of its non-American subsidiaries is considered for purposes of computing Alcancorp's taxes, Alcan is not the actual taxpayer and California's remedy is available only to taxpayers.

The Ninth Circuit recently addressed the issue of whether a foreign parent corporation, which is not a taxpayer, is barred by section 1341 from maintaining an action in federal court because a "plain, speedy and efficient" remedy is available to its domestic taxpaying subsidiary. In *Capitol Industries-EMI, Inc. v. Bennett*, No. 80-4113 (9th Cir. Feb. 16, 1982), a case involving issues strikingly similar to those before this Court, the court held that section 1341 did not bar the exercise of subject matter jurisdiction because, although the claims of foreign parent and domestic subsidiary corporations were substantially the same, the interests were not necessarily identical. Thus, it found that the state courts did not provide a remedy to the foreign

parent corporation. *Capitol Industries-EMI, Inc. v. Bennett, supra,* slip op. at 10-12. Although this Court questions whether the parent and subsidiary's interests are not so similar that the subsidiary's action would determine the claims of both parties, we will follow the Ninth Circuit in holding that section 1341 does not bar the plaintiff's claim. As California is in the Ninth Circuit, that Court is in a better position to decide this issue of state law, that is, the availability of the state remedy to the parent corporation. *Factors Etc., Inc. v. Pro Arts, Inc.,* 652 F.2d 278, 283 (2d Cir. 1981) (federal courts in other circuits should defer to the pertinent circuit's holdings on first impression questions of law).

The defendants' second argument is that this action must be dismissed because the Eleventh Amendment bars federal courts from hearing suits "commenced or prosecuted against one of the United States." U.S. Const. amend. XI. In *Capitol Industries,* however, the Ninth Circuit held that the Eleventh Amendment does not bar federal court actions against state officials to enjoin them from enforcing unconstitutional statutes. *Capitol Industries-EMI, Inc. v. Bennett, supra,* slip op. at 12; *see also Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 689-90 (1949); *United States Steel Corp. v. Multistate Tax Commission,* 367 F. Supp. 107, 112-15 (S.D.N.Y. 1973). This Court agrees with the Ninth Circuit and holds that the Eleventh Amendment does not bar plaintiff's claim.

Defendants' third point is that governmental immunity shields the individual defendants from any liability for discretionary acts performed in their official capacity. In support of this proposition, however, defendants have cited authority that may provide a shield from damages, but not from injunctive or declaratory relief. In this action,

plaintiff primarily seeks declaratory and injunctive relief, which is not barred by the case law or the California constitution or statutes cited by defendants.

The defendants' fourth argument is that plaintiff lacks the requisite injury to have standing. First, they argue that Alcan's relation to Alcancorp is that of a shareholder and that such a relationship gives Alcan merely an expectancy interest in Alcancorp's corporate earnings, not a property interest. Thus, they conclude that plaintiff has no standing because the speculative nature of its interest precludes Alcan from showing injury. Second, they argue that Alcan has not received the requisite direct and substantial injury to have standing because Alcan was not the taxpayer. Plaintiff responds that it has two direct injuries, namely, multiple taxation in violation of the Foreign Commerce Clause and a diminished ownership interest in Alcancorp.[5] *Capitol Industries* offers no specific guidance on standing. *See Capitol Industries-EMI, Inc. v. Bennett, supra,* slip op. at 11 n.31. Although plaintiff's claims of standing appear tenuous, this Court does not dismiss the case on that issue at this time and it need not now be decided in light of the steps provided hereinafter for resolution of the substantive issues.

Defendants' final contention is that this Court should abstain from exercising its jurisdiction. According to the defendants, absent a patently invalid statute, abstention is proper when the dispute involves restraint of state tax collection. *See Colorado River Water Conservation District v. United States,* 424 U.S. 800, 816 (1976). The Ninth Circuit stated in *Capitol Industries* that because the foreign parent corporation was found not to have an adequate rem-

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5. Alcan argues that because it is the sole shareholder of Alcancorp, its interest is not the expectancy interest of an ordinary shareholder, but an ownership interest.

edy in state court, it would be inappropriate to abstain should abstention result in dismissal. *Capitol Industries-EMI, Inc. v. Bennett, supra,* slip op. at 13 n.34. It did note, however, that a stay pending decision by the highest state court might be appropriate in light of the fact that it was unclear how the highest California court would rule on the issue of whether unitary taxation encompasses the overseas operations of United States corporation. *Id.* at 13 n.34.

A stay is particularly appropriate in the case at bar. First, the issues involve uncertainty as to interpretation of state law and its constitutionality. Second, several domestic corporations are already seeking review of the FTB's method of assessing income taxes on the worldwide unitary method by the Supreme Court of the United States or the highest court of California. *See, e.g., Container Corp of America v. Franchise Tax Board,* 117 Cal. App. 3d 988, 173 Cal. Rptr. 121 (1981); *Anaconda v. Franchise Tax Board of California,* No. 1-48666 (Ct. App. March 24, 1982); *Firestone Tire & Rubber Co. v. Franchise Tax Board of California,* No. 2-62918 (Ct. App., filed 1981); *Caterpillar Tractor Co. v. Lenkos,* 84 Ill. 2d 102, 417 N.E.2d 1343, *cert. granted sub nom. Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.,* 102 S.Ct. 564 (1981). Final decisions in these cases, followed by the state court's decision on Alcancorp's case,[6] may render plaintiff's substantive claims moot.[7]

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6. Alcancorp's state action is presently inactive, awaiting the determination of other cases raising similar issues that were already on appeal, but there is no known impediment to the reactivation of the case.

7. This Court recognizes that plaintiff's claims are not those of a domestic corporation and that the pending actions would render plaintiff's claims moot only if the Supreme Court of the United States or the highest California court forbade the worldwide taxation of overseas domestic operations. If those courts

(Continued on following page)

Finally, staying this action pending resolution of Alcancorp's case before the state court[8] furthers the Congressional purpose in enacting the Anti-Injunction Statute, 28 U.S.C. § 1341 (1976). One reason that Congress enacted the statute was to prevent out-of-state corporations from having access to state and federal courts while limiting domestic corporations to state courts. *See Aluminum Co. of America v. Dep't of Treasury of Mich.*, 522 F.2d 1120, 1123-24 (6th Cir. 1975); S. Rep. No. 1035, 75th Cong., 1st Sess. 1-2 (1937). As the Ninth Circuit suggested, to allow a parent corporation to bring an action in federal court to challenge the assessment of a tax on its subsidiary, is to circumvent Congress's basis for enacting the anti-injunction statute. *Capitol Industries-EMI, Inc. v. Bennett, supra*, slip op. at 12 n.32. If this Court denied plaintiff access to the federal courts, however, plaintiff would, under the reasoning of *Capital Industries*, have no forum because the California remedy is not available to nontaxpayers.[9] In light of these considerations and the fact that plaintiff would suffer no imminent harm by postponement of a decision on the merits, it is both unnecessary and unwise

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Footnote continued—

rendered any other decision, plaintiff's substantive questions about the propriety of state taxation affecting foreign corporations in the manner that Alcan is affected would warrant close consideration in the proper forum, assuming plaintiff shows standing. *See Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979) (California's ad valorem property taxation of crates of a Japanese shipping company handled in California is unconstitutional on grounds that the tax interfered with the exclusive federal authority to affect foreign commerce).

8. *See supra* note 6.

9. Perhaps the best solution to this predicament would be for California to provide a "plain, speedy and efficient" remedy for all injured parties including nontaxpayers. *Capitol Industries-EMI, Inc. v. Bennett, supra*, slip op. at 12 n.32. This Court, however, is not in a position to influence the California legislature.

for this Court to decide plaintiff's substantive questions at this time.

Thus, this action is stayed pending a disposition of the issues concerning the FTB's worldwide unitary taxation method in Alcancorp's case in state court, or in other cases before the highest California court or the Supreme Court of the United States.[10] The Clerk will place this action on the suspense calendar pending further direction from this Court.

SO ORDERED.

DATED: New York, N.Y.
May 20, 1982

/s/ GERARD L. GOETTEL
U.S.D.J.

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10. In light of this determination, the Court defers decision of some of the other issues raised, such as whether plaintiff has standing, whether the correct defendants have been sued, Cal. Gov't Code § 15700 (West 1980), and whether the venue is proper and convenient. 28 U.S.C. §§ 1404(a) and 1406(a) (1976).

APPENDIX IV

Letter, September 24, 1983, Prime Minister Pierre Trudeau to President Ronald Reagan

PRIME MINISTER — PREMIER MINISTRE

Ottawa, K1A OA2

September 24, 1983

Dear Ron,

I am writing to you to express the Canadian government's serious concern about the unitary tax issue which I understand you are now considering.

This method of taxation which permits individual state governments to levy taxes against the world-wide earnings of multinational corporations is, in our view, undesirable. In many cases, it places international enterprises in the position of having to pay tax in one jurisdiction for profits earned (and taxed) elsewhere.

The recent Supreme Court decision in the case of Container Corporation vs the California State Franchise Tax Board has considerably heightened the Canadian government's concerns. In addition to the serious potential for double taxation and the increased administrative costs for business, there is the danger that other states and countries, more occupied with a need for increased tax revenues than with consistent tax standards, may adopt this method.

I realize that the issues involved here are not simple, but I am concerned that this could become a major stumbling block to international business and have an effect on our bilateral economic relations. Accordingly, I would

strongly encourage your decision to be one that would lead to a curtailing of this practice.

Yours sincerely,

/s/ Pierre

The Honourable Ronald Reagan
President of the United States of America
The White House
Washington, D.C.